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In The
Supreme Court of the United States

REBECCA FRIEDRICHS; SCOTT WILFORD; JELENA FIGUEROA; GEORGE W. WHITE, JR.; KEVIN ROUGHTON; PEGGY SEARCY; JOSE MANSO; HARLAN ELRICH; KAREN CUEN; IRENE ZAVALA; AND CHRISTIAN EDUCATORS ASSOCIATION INTERNATIONAL,

Petitioners,

v.

CALIFORNIA TEACHERS ASSOCIATION, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR GOLDWATER INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether *Abood v. Detroit Bd. of Ed.*, 431 U.S. 209 (1977) should be overruled and Petitioners should no longer have to fund speech they oppose in order to earn a living in their chosen profession.

2. Whether it violates the First Amendment to presume that Petitioners consent to subsidizing non-chargeable speech by the group they are compelled to fund, rather than requiring that Petitioners affirmatively consent to subsidizing such speech.

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IDENTITY AND INTEREST OF *AMICUS CURIAE*[1]

The Goldwater Institute was established in 1988 as a nonpartisan public policy and research foundation dedicated to advancing the principles of limited government, economic freedom, and individual responsibility through litigation, research papers, editorials, policy briefings, and forums. Through its Scharf-Norton Center for Constitutional Litigation, the Institute litigates and occasionally files *amicus* briefs when its or its clients' objectives are directly implicated.

The Goldwater Institute seeks to enforce the features of our state and federal constitutions that protect individual rights, including the rights to free speech and free association. To this end, the Institute is currently defending the constitutionally protected rights of a plaintiff who has found himself similarly situated to Petitioners here; namely, that he is compelled to fund speech he opposes in order to earn a living in his chosen profession. *See Fleck v. McDonald, et al.*, 1:15-cv-00013-DLH-CSM (D.N.D. filed February 3, 2015).

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[1] Pursuant to Supreme Court Rule 37(6), counsel for *amicus curiae* affirms that no counsel for any party authored this brief in whole or in part and that no person or entity, other than *amicus*, its members, or counsel, made a monetary contribution to the preparation or submission of this brief. All parties have been given timely notice of and have consented to the filing of this brief.

The Goldwater Institute is a non-partisan, tax exempt educational foundation under Section 501(c)(3) of the Internal Revenue Code. It has no parent corporation. It has issued no stock. It certifies that it has no parents, trusts, subsidiaries and/or affiliates that have issued shares or debt securities to the public.

SUMMARY OF ARGUMENT

This case presents an important opportunity for the Court to vindicate the First Amendment rights of Petitioners by overruling *Abood v. Detroit Bd. of Ed.*, 431 U.S. 209 (1977), ending the practice of forcing Petitioners to fund speech they oppose in order to earn a living in their chosen profession.

The Court should not heed vested special interests' warnings that overruling *Abood* and casting doubt on other compelled fee arrangements like mandatory bar associations will have dire consequences and lead to a flood of litigation. If reconsideration of *Abood* led mandatory bar associations to be found unconstitutional, the states with mandatory bar associations would merely join the 18 states that already regulate attorneys without conditioning the practice of law on bar association membership. Without compulsion, these 18 states already satisfy the compelling state interest of improving the practice of law through the regulation of attorneys that justifies mandatory bar association membership. The states

that compel bar association membership will be able to as well.

Moreover, permitting mandatory bar associations has created a flood of litigation. Mandatory bar associations have continually violated the rights of their members and failed to provide them with the safeguards required by *Keller v. State Bar of California*, 496 U.S. 1, 14 (1990) and *Chicago Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292, 303 (1986). The result has been an unbroken chain of litigation that persists to this day.

If the Court decides not to overrule *Abood*, at the very least Petitioners should no longer have to bear the burden of "opting out" of non-germane expenditures. Under *Hudson* and *Keller*, groups that receive the remarkable boon of compelled fees must institute safeguards carefully tailored to minimize the infringement of First Amendment rights. However, these safeguards cannot adequately minimize First Amendment infringement unless coupled with affirmative consent to funding non-germane expenditures.

For these reasons and the reasons advanced by Petitioners, the Court should grant the petition for writ of certiorari.

ARGUMENT

I. REVISITING *ABOOD* WILL NOT HAVE THE DIRE CONSEQUENCES OFTEN WARNED OF BY MANDATORY BAR ASSOCIATIONS AND OTHER VESTED SPECIAL INTERESTS.

A. Eighteen states already regulate attorneys without impinging upon First Amendment rights.

The relief that Petitioners seek is quite modest. All Petitioners ask is that they not be forced to fund speech they oppose in order to earn a living in their chosen profession.

Special interests that currently receive the "remarkable boon" of compelled fees, *Knox v. Service Employees Intern. Union*, 132 S. Ct. 2277, 2290-93 (2012), see this request quite differently. As part of an effort to discourage reconsideration of *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), they warn that upsetting *Abood* will cast other compelled fee arrangements into doubt, often citing mandatory state bar associations as a prime example of a special interest at risk. *See* Brief of Respondent SEIU Healthcare Illinois & Indiana, *Harris v. Quinn*, 134 S. Ct. 2618 (2014) (No. 11-681), at 28 ("By asking this Court to overrule *Abood*, petitioners necessarily ask this Court to overrule *Keller* [*v. State Bar of California*, 496 U.S. 1, 14 (1990)]."); *see also* Brief for Respondent, *Knox*, 132 S. Ct. 2277 (2012) (No. 10-1121), at 42 (Should petitioners succeed, "every state bar

will have to revisit the procedures it implemented based on *Keller*'s holding . . . "). Indeed, an *amicus* brief filed in *Harris v. Quinn* by the 21 Past Presidents of the D.C. Bar speculated that overturning *Abood* would have a "profoundly destabilizing impact on bars all over the country," Brief of 21 Past Presidents of the D.C. Bar as Amici Curiae Supporting Respondents, *Harris*, 134 S. Ct. 2618 (2014) (No. 11-681), at 2, and "create uncertainty and instability injurious to the important work that mandatory bars do both for the legal profession and for the administration of justice." *Id.* at 3.

But we need not speculate upon what impact would actually be realized if this Court vindicates the First Amendment rights of Petitioners. In the case of bar associations, at least, we know exactly what will happen if reconsideration of *Abood* leads to *Keller* falling as well: The 32 states with mandatory bar associations would merely join the 18 states that already regulate attorneys without conditioning the practice of law on bar association membership. *See In re Petition for a Rule Change to Create a Voluntary State Bar of Nebraska*, 286 Neb. 1018, 1022 (2013); *see also* ABA Division for Bar Services, *2011 State and Local Bar Membership, Administration and Finance Survey* (2012); Ralph H. Brock, *"An Aliquot Portion of Their Dues:" A Survey of Unified Bar Compliance with* Hudson *and* Keller, 1 Tex. Tech J. Tex. Admin. L. 23 (2000). The "important work that mandatory bars do both for the legal profession and for the administration of justice" would carry on, just

without attorneys being forced to join a bar association.

A mandatory bar association can only compel dues to the extent mandatory dues are necessary to further the compelling state interest of improving the quality of legal services through the regulation of attorneys. *Keller*, 496 U.S. at 14; *Lathrop v. Donohue*, 367 U.S. 820, 843 (1961). Yet 18 states – Arkansas, Colorado, Connecticut, Delaware, Illinois, Indiana, Iowa, Kansas, Maine, Maryland, Massachusetts, Minnesota, New Jersey, New York, Ohio, Pennsylvania, Tennessee, and Vermont – have already found ways of regulating attorneys without compelling membership at all. Like attorneys in mandatory bar association states, attorneys in voluntary states still have to be licensed to practice law and they still must adhere to ethical standards. If they wish to join a bar association, they may,[2] but if their views diverge with the bar association, attorneys are free to leave and continue practicing law.

Instituting regulatory arrangements that reflect the wisdom that "[t]he mere fact that a lawyer has important responsibilities in society does not require or even permit the State to deprive him of those protections of freedom set out in the Bill of Rights," *Lathrop v. Donohue*, 367 U.S. 820, 876 (1961) (Black,

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[2] Every voluntary state still has an active state bar association, *see* ABA Division for Bar Services, *2011 State and Local Bar Membership, Administration and Finance Survey* (2012).

J., dissenting), has not prevented any of these states from achieving high levels of practice or led to any lapse in the regulation of attorneys. It would be absurd to say that a state with a voluntary bar association like New York, one of largest economies in the world[3] and home to some of the United States' most esteemed jurists and practitioners, has failed in its efforts to improve the quality of legal services through the regulation of attorneys.

Moreover, these states do not face the persistent legal challenges that follow mandatory state bar membership.

B. The continued failure of mandatory state bar associations to comply with *Keller* has led to a flood of litigation with no end in sight.

While states with voluntary bar associations continue to adequately regulate their attorneys without impingement on their First Amendment rights, states with mandatory bars have struggled to own up to the responsibilities that accompany the

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[3] According to the Bureau of Economic Analysis, the State of New York's gross domestic product was $1.3 trillion in 2013, the third largest in the United States. *See* http://www.bea.gov/regional/bearfacts/action.cfm?geoType=3&fips=36000&areatype=36000. Moreover, New York is the 16th largest economy in the world. *See* H. Joseph Drapalski III, *The Viability of Interstate Collaboration in the Absence of Federal Climate Change Legislation*, 21 Duke Envtl. L. & Policy Forum 469, 493 n.46 (2011).

privilege of receiving coerced dues. Like public employee unions, mandatory bar associations are allowed to collect and spend dues only for "chargeable expenditures" – meaning expenditures related to the narrow purpose found to justify abridging members' First Amendment rights. *Knox*, 132 S. Ct. at 2301; *United States v. United Foods, Inc.*, 533 U.S. 405 (2001); *Ellis v. Bhd. of Ry., Airline & S.S. Clerks, Freight Handlers, Exp. & Station Employees*, 466 U.S. 435, 447 (1984); *Abood*, 431 U.S. at 235-36. To ensure members are compelled to foot the bill only for this narrow subset of expenditures, mandatory associations must institute safeguards "carefully tailored to minimize the infringement" of members' First Amendment rights. *Chicago Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292, 303 (1986).

These minimum safeguards must provide: (a) notice to members, including an adequate explanation of the basis for the dues and calculations of all non-chargeable activities, verified by an independent auditor; (b) a reasonably prompt decision by an impartial decision maker if a member objects to the way his or her mandatory dues are being spent; and (c) an escrow for the amounts reasonably in dispute while such objections are pending.[4] *Keller*, 496 U.S. at

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[4] These three minimum safeguards work together to limit violations of members' First Amendment rights by giving them information, recourse, and remedy. Collecting mandatory dues while failing to implement just one of the *Keller/Hudson* safeguards would be a violation of Plaintiff's First and Fourteenth Amendment rights, *see Cummings v. Connell*, 316 F.3d

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14; *Hudson*, 475 U.S. at 310. The safeguards are meant to both ensure that members' mandatory dues are used only for chargeable expenditures and help provide a member recourse to protect her constitutional rights. *Id.*, 475 U.S. at 302, 307 n.20.

Despite the paramount importance of these safeguards in protecting members' First Amendment rights from further impingement, ten years after *Keller* was decided, a staggering 26 of the 32 states with mandatory bar associations had failed to institute safeguards that met the constitutional minimum. Ralph H. Brock, *"An Aliquot Portion of Their Dues:" A Survey of Unified Bar Compliance with* Hudson *and* Keller, 1 Tex. Tech J. Tex. Admin. L. 23, 53-85 (2000).[5] Unsurprisingly, this has led to a surfeit of litigation. *See, e.g.*, *Lautenbaugh v. Nebraska State Bar Ass'n*, 2012 WL 6086913 (D. Neb. Dec. 6, 2012); *Kingstad v. State Bar of Wisconsin*, 622 F.3d 708 (7th Cir. 2010); *Romero v. Colegio De Abogados De Puerto Rico*, 204 F.3d 291 (1st Cir. 2000); *Popejoy v. New*

886, 890-91 (9th Cir. 2003) (public union's failure to provide verification by an independent auditor of its financial disclosures was a *Hudson* violation).

[5] Professor Brock identified the mandatory state bar associations of Alabama, Alaska, Arizona, Florida, Georgia, Hawaii, Idaho, Kentucky, Louisiana, Michigan, Mississippi, Missouri, Montana, Nevada, New Hampshire, North Carolina, North Dakota, Oklahoma, Oregon, Rhode Island, South Carolina, South Dakota, Texas, Utah, Virginia, and Wyoming as having either deficient *Keller/Hudson* safeguards or no *Keller/Hudson* safeguards at all. 1 Tex. Tech J. Tex. Admin. L. at 53-85 (2000).

Mexico Bd. of Bar Comm'rs, 887 F. Supp. 1422 (D.N.M. 1995); *Schneider v. Colegio de Abogados de Puerto Rico*, 917 F.2d 620 (1st Cir. 1990). Most recently, the Goldwater Institute filed suit on behalf of North Dakota attorney Arnold Fleck because the State Bar Association of North Dakota fails to provide its members with *any* of the required *Keller/Hudson* safeguards. Complaint at 7-8, *Fleck v. McDonald, et al.*, 1:15-cv-00013-DLH-CSM (D.N.D. filed February 3, 2015) (ECF #1).

Mr. Fleck's experience during the run-up to the North Dakota election held on November 4, 2014, shows the inherent danger of relying on *Keller/Hudson* safeguards to protect the First Amendment rights of those compelled to pay dues to mandatory bar associations. Mr. Fleck, as an attorney licensed in North Dakota, is compelled to pay dues to the State Bar Association of North Dakota ("SBAND"). *Id.* at 3. He strongly supported North Dakota Initiated Statutory Measure No. 6 ("Measure 6"), which appeared on the North Dakota ballot on November 4, 2014. *Id.* at 3-4. Measure 6 proposed to "amend section 14-09-06.2 of the North Dakota Century Code to create a presumption that each parent is a fit parent and entitled to be awarded equal parental rights and responsibilities by a court unless there is clear and convincing evidence to the contrary." Official Ballot Language for Measures Appearing on the Election Ballot, North Dakota Secretary of State (available at https://vip.sos.nd.gov/pdfs/measures%20Info/2014%20General/Official_Ballot_Language_2014_General.pdf)

(last accessed on Jan. 30, 2015). Mr. Fleck not only contributed $1,000 to a ballot measure committee in support of Measure 6, he participated in the campaign – even appearing on television and radio to debate the merits of the measure. *Id.* at 8-9.

A few weeks before the election, Mr. Fleck discovered that he was not the only one spending his money on a Measure 6 campaign. *Id.* at 9. SBAND threw its weight behind the *opposition* to the Measure and expended member dues in the process, giving $50,000 to a committee that opposed Measure 6. *Id.* Measure 6 ultimately failed at the polls. *Id.* at 3.

Mr. Fleck reasonably thought this was a misuse of his dues but he was not afforded any of the *Keller/Hudson* safeguards to protect his constitutional rights. Because SBAND provides no notice nor endeavors to categorize items as chargeable and nonchargeable, Mr. Fleck only became aware of SBAND's use of his money to oppose Measure 6 through a fellow supporter of the measure mere weeks before the election. *Id.* at 9. This was long after his money had already been spent and the campaign kicked into high gear. Worse, Mr. Fleck was not able to challenge the misuse of his dues before an impartial decision maker. *Id* at 8. Under SBAND's procedure, he would have had to contact the Executive Director of SBAND – the most partial decision maker imaginable. *Id.* at 7. The Executive Director was actually serving on the committee of the Ballot Measure Committee that received SBAND's contribution. *Id.* at 9. Faced with

this sham process, Mr. Fleck was left with no alternative but to file suit against SBAND.

Considering the lax manner in which many mandatory state bar associations have implemented the *Keller/Hudson* safeguards, Mr. Fleck's experience is not unique. More litigation is imminent. Any special interest warning that revisiting *Abood* and undermining *Keller* will lead to a flood of litigation has to first turn a blind eye to the very real and ongoing flood *Keller* has actually caused.

Because of these continuing problems with mandatory bar associations, states are beginning to recognize that First Amendment impingements have a tendency to spread beyond germane expenditures to non-germane expenditures and to create disputes about where that line falls. The result is that the number of states with voluntary bar associations will likely grow, making any impact revisiting *Abood* could have on mandatory bar associations vis a vis *Keller* increasingly moot. For instance, as of the filing of this brief, the Arizona Legislature is currently considering a bill that would make the Arizona State Bar Association voluntary. *See* H.R. 2629, 52nd Leg., 1st Reg. Sess. (Ariz. 2015).

In considering the petition here, this Court should disregard any speculation that reconsideration of *Abood* will have dire consequences for mandatory bar associations. The fact of the matter is 18 states are achieving the compelling state interest of improving the practice of law through the regulation of attor-

neys without the compulsion of mandatory state bar associations and without the litigation that comes with compulsion. If *Abood* is overturned and *Keller* is cast into doubt, the number of states with voluntary bar associations would rise to 50. Little else would change except the demise of litigation challenging the misuse of mandatory dues and the nonexistence or inadequacy of *Keller/Hudson* safeguards.

II. "OPT-OUT" PROCEDURES UNDERMINE THE *HUDSON/KELLER* SAFEGUARDS.

In *Knox*, this Court observed that "[b]y authorizing a union to collect fees from nonmembers and permitting the use of an opt-out system for the collection of fees levied to cover non-chargeable expenses, our prior decisions approach, if they do not cross, the limit of what the First Amendment can tolerate." *Knox*, 132 S. Ct. at 2291. If *Abood* is not reconsidered, at the very least those compelled to fund mandatory association schemes should no longer shoulder the burden of "opting out" of non-germane expenditures.

The safeguards afforded by *Hudson* and *Keller* discussed *infra* are designed to minimize the infringement of First Amendment rights necessarily caused by compelled-fee schemes and ensure compelled fees are only used for germane expenditures. *See Hudson*, 475 U.S. at 303 (the collection of compelled fees burdens rights to freedom of speech and

association, and "the fact that those rights are protected by the First Amendment requires that the procedure be carefully tailored to minimize the infringement."); *Seidemann v. Bowen*, 499 F.3d 119, 124 (2d Cir. 2007) (holding that a union's burden includes adopting procedures "that least interfere with an objecting employee's exercise of his First Amendment rights") (quoting *Shea v. Int'l Ass'n of Machinists & Aerospace Workers*, 154 F.3d 508, 515-17 (5th Cir. 1998)). But only through allowing Petitioners to affirmatively consent to funding non-chargeable activities will their First Amendment rights be adequately walled off from impingements beyond those purportedly justified by a compelling government interest. Safeguards designed to limit First Amendment infringement that begin with a presumption that all those compelled to pay fees to a group also want to fund the group's non-germane activities cannot possibly afford adequate protection.

For instance, supporters of Measure 6 intend to place the measure on the North Dakota ballot in a future election. Even if the State Bar Association provides Mr. Fleck with all of the safeguards set forth in *Hudson* and *Keller* at that time, but requires him to opt out of non-germane spending, he would still be presumed to want to fund the opposition to the ballot measure unless he opts out. If for any reason he fails to timely opt out, however, Mr. Fleck will have automatically forfeited his First Amendment right not to fund non-germane expenditures and he will be powerless to prevent SBAND from spending

his money in support of legislative goals he staunchly opposes.

An opt-out system places the burden on the wrong party and leads to the unjust and needless encroachment upon First Amendment rights the *Hudson/Keller* safeguards are supposed to prevent. There is no compelling government interest that can justify the inherent First Amendment burden of collecting compelled dues for non-germane expenditures; only funds given voluntarily are constitutionally permitted to fund such expenditures. Therefore, only affirmative consent creates a sufficient barrier between compelled dues and voluntary funds. Without the addition of affirmative consent, the carefully tailored safeguards of *Hudson* and *Keller* are ineffective.

CONCLUSION

For the foregoing reasons, the judgment of the Ninth Circuit should be reversed.

Respectfully submitted,

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